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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 479

WILMA URCH COLVILLE, Executrix of the Last Will and Testament of Charles J. Colville, Deceased,
Petitioner,

vs.

ISABELLE C. KOCH, Individually and as Administratrix of the Estate of Edward Cebrian, Deceased,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Respondent, Isabelle C. Koch, individually and as administratrix of the estate of Edward Cebrian, deceased, presents her brief in answer and opposition to the Petition for Writ of Certiorari filed herein by

Wilma Urch Colville, as executrix of the Estate of Charles J. Colville, deceased.

QUESTIONS PRESENTED.

1. Did the District Court fail to make findings as to the place of residence, as stated in the Petition? (Petition 2, question 1.)

2. Did the District Court decide as a matter of law that intent to defraud is an essential element for equitable relief from a judgment, as stated in the Petition? (Petition 2 and 3, questions 2 and 3.)

3. Were the special affirmative defenses (not decided by the District Court) briefed and argued on review to the Court of Appeals and thus properly presented and decided by the Court of Appeals as further supporting the judgment of the District Court? (Petition 3, question 4.)

4. Was the District Court (if it did not decide the alleged issue as to place of residence) precluded from examining this issue by the final judgment of the state probate Court under applicable California law?

5. Did the District Court err as a matter of law in finding and deciding that Respondent committed no fraud, extrinsic in character, with respect to the probate proceedings in the state Court?

6. Did the District Court and the Court of Appeals decide an important state question in a way in conflict with applicable state law?

7. Did the Court of Appeals (though not committing error) so far depart from the accepted and usual course of judicial proceedings as to call for the exercise by this Court of its power of supervision?

STATUTORY PROVISIONS INVOLVED.

California Probate Code:

"Section 302. Conclusiveness of Order Granting Letters: Exception. In the absence of fraud in its procurement, an order of the superior court granting letters, when it becomes final, is a conclusive determination of the jurisdiction of the court (except when based upon the erroneous assumption of death), and cannot be collaterally attacked."

"Section 441. Procedure Before Hearing. The clerk shall set the petition for hearing by the court and give notice thereof by causing a notice to be posted at the courthouse of the county where the petition is filed, giving the name of the decedent, the name of the applicant, and the time at which the application will be heard. Such notice must be given at least ten days before the hearing. The clerk shall cause similar notice to be mailed, postage prepaid, to the heirs of the decedent named in the petition, at least ten days before the hearing, addressed to them at their respective postoffice addresses, as set forth in the petition, otherwise at the county seat of the county where the proceedings are pending."

"Section 707. Claims on Contract for Funeral Expenses, Damages, and Under Section 575: Necessity of Filing Within Time Provided: Effect

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of Failure to File: Entry of Claims in Register. All claims arising upon contract, whether they are due, not due, or contingent, and all claims for funeral expenses and all claims for damages for physical injuries or death or injury to property or actions provided for in Section 574 of this code, must be filed or presented within the time limited in the notice or as extended by the provisions of Section 702 of this code; and any claim not so filed or presented is barred forever, unless it is made to appear by the affidavit of the claimant to the satisfaction of the court or a judge thereof that the claimant had not received notice, by reason of being out of the State, in which event it may be filed or presented at any time before a decree of distribution is rendered. The clerk must enter in the register every claim filed, giving the name of the claimant, the amount and character of the claim, the rate of interest, if any, and the date of filing."

"Section 708. Effect of Statute of Limitations. No claim which is barred by the statute of limitations shall be allowed or approved by the executor or administrator, or by the judge. When a claim is presented to a judge for his allowance or approval, he may, in his discretion, examine the claimant and others on oath, and hear any legal evidence touching the validity of the claim. No claim which has been allowed is affected by the statute of limitations, pending the administration of the estate."

California Code of Civil Procedure.

"Section 335. Periods of Limitation Prescribed. The periods prescribed for the com-

mencement of actions other than for the recovery of real property, are as follows:"

"Section 337. (Within Four Years.) Within four years: 1. An action upon any contract, obligation or liability founded upon an instrument in writing, except as provided in Section 336a of this code; provided, that the time within which any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage."

"Section 338. (Within Three Years.) Within three years: 4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

"Section 361. Limitation Laws of Other States, Effect of. When a cause of action has arisen in another state, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state, and who has held the cause of action from the time it accrued."

"Section 473. (Pleadings May Be Amended: Continuance: Relief From Judgment Taken By

Mistake, Inadvertence, Surprise, or Excusable Neglect: Correction of Clerical Mistakes in Judgments or Orders: Setting Aside Void Judgment or Order.) * * *

"*(Relief from judgment taken by mistake, inadvertence, surprise, or excusable neglect.)* The court may upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken."

Civil Code of California.

"Section 1709. Fraudulent Deceit. One who wilfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damages which he thereby suffers."

SUMMARY OF ARGUMENT.

1. The District Court made findings as to the place of residence of Edward Cebrian when he died in 1944. (Appendix to Petition 6, Finding 15, Appendix 7, Finding 19.) Petitioner's main argument is based upon the erroneous assumption that the Court of Ap-

peals decided issues raised by pleadings, but on which the District Court failed to make any finding of fact.

2. The District Court, in finding that Respondent performed no act with intent to deceive, delay, defraud or mislead creditors of Edward Cebrian's estate, did not either (i) decide that such lack of intent was an indispensable element of Petitioner's cause of action, or (ii) place its finding against the existence of fraud upon this ground. However, in California, even if the District Court had stated that its finding that no actual fraud had been committed was based upon a lack of intent to deceive, such conclusion would have been based upon applicable California law.

Cohen v. Penn. Mutual Life Ins. Co. (1956), 144 A.C.A. 507 (301 Pac. 2d 253);
23 *Cal. Jur.* 2d 168, Sec. 67.

3. Respondent briefed and argued her affirmative defenses before the Court of Appeals. Although Petitioner filed a reply brief in the Court of Appeals on the fraud issue, she ignored Respondent's affirmative defenses and filed no brief as to them at any time. Both Respondent and Petitioner had filed written briefs and argued these special defenses before the District Court over a period of several years. Therefore, the issues of law raised by these affirmative defenses were properly presented to and decided by the Court of Appeals.

4. Petitioner and her predecessors were bound by the final judgment of the state probate court on the question of Edward Cebrian's residence in San Fran-

cisco when he died. Such judgment was conclusive in the absence of extrinsic fraud.

Estate of Crisler (1948), 83 Cal. App. 2d 431, 188 Pac. 2d 772;

Estate of Robinson (1942), 19 Cal. 2d 534, 121 Pac. 2d 734.

5. The findings of fact and conclusions of law on the lack of extrinsic fraud were amply supported by the evidence.

(A) The fact of Edward Cebrian's San Francisco residence was supported by evidence of his intent, through declarations and letters to his relatives, his actions, his maintaining a home in San Francisco from early boyhood until events beyond his control made this no longer possible. (Respondent's Deposition. Testimony in Record.)

(B) The fact of Edward Cebrian's San Francisco residence was determined for all purposes involved in this action by a final judgment of a court of general jurisdiction. (Appendix 8, Conclusion III.) Respondent did not mislead, misrepresent or deceive the Probate Court or any creditor. Respondent did nothing which prevented or had any effect upon the filing of a creditor's claim on the note in suit. (Appendix 6, Finding 16.)

6. The issues of law as to the effect of voting upon the question of legal domicile were decided in conformity with California law. Registration and voting are factors to be considered in determining the sub-

ject's intent as to his legal residence but they are not conclusive on the issue.

Estate of Spencer (1926), 198 Cal. 329, 245 Pac. 176;

Bradley v. Davis, 156 Cal. 267; 104 Pac. 302.

7. The length of Respondent's single brief, filed in the Court of Appeals, was one hundred nine (109) pages, including the argument on her special defenses. Petitioner's opening brief had cited fifty-eight (58) cases on the main fraud issue, plus numerous code sections and texts. A rule of the Court of Appeals limits briefs to eight (80) pages unless leave is granted to file a longer brief. No objection to the length of Respondent's brief was made in the Court of Appeals by Petitioner, the Clerk or the Court. No petition for rehearing was filed by Petitioner. In the absence of objection below, the length of Respondent's brief does not justify the issuance of a Writ of Certiorari.

STATEMENT OF THE CASE.

Edward Cebrian made a promissory note for $10,276.92 dated November 15, 1932, which was payable in Lexington, Kentucky, on May 15, 1933, over nineteen years before this action was commenced. *(Appendix 2, Finding 5.) Edward Cebrian died in 1944 and on February 26, 1945 Respondent was appointed administratrix of his estate in probate proceedings in the City and County of San Francisco, State of California.

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*References to Appendix are to the Appendix to the Petition for Certiorari.

(Appendix 5, Finding 13.) Notice of the petition for letters of administration was given in all respects as required by California law. (Appendix 5, Finding 12.) Petitioner has physical possession of the promissory note of Edward Cebrian but failed to prove a complete chain of title from the original payee. (Appendix 15 and 18, Opinion.) Respondent caused notice to creditors of the estate of Edward Cebrian to be published for the time and in the manner required by California law. (Appendix 6, Finding 17.) No claim was ever filed by any holder of the promissory note in the proceedings for the probate of the estate of Edward Cebrian. (Appendix 6, Finding 17.)

Respondent in her answer and at all stages of this action, in all Courts below, plead, briefed and urged various special defenses based upon the statutes of limitations of California and Kentucky, laches and Petitioner's lack of title to the promissory note, which defenses, in turn, involve questions of conflicts of laws and interpretation of the terms of the note. (R. 19, 20.)

The main issue, and the only issue decided by the District Court, was whether or not Respondent committed such fraudulent acts in connection with the probate of the Edward Cebrian estate that Petitioner and her predecessors should be relieved from their failure to file a probate claim prior to August 26, 1945 against Edward Cebrian's estate. The District Court found that Respondent did not "intermeddle with the proper probate of the estate of Edward Cebrian, deceased, either wrongfully or fraudulently", (Appen-

dix 6, Finding 14), that she did not "conceal, fraudulently or otherwise, the existence of the assets of the said Edward Cebrian" (Appendix 6, Finding 15); that she "committed no fraud, extrinsic in character, with respect to the probate proceedings in the matter of the estate of Edward Cebrian, either in the County of Los Angeles or the City and County of San Francisco, State of California". (Appendix, 8, Conclusion III).

The District Court further found that no acts of the Respondent deprived Petitioner, or her predecessors, of their right to file claims. (Appendix 6, Finding 16.)

ARGUMENT.

1. DISTRICT COURT FOUND ON RESIDENCE ISSUE.

In addition to the foregoing findings of fact made by the District Court, and despite the repeated assertion in the petition that no finding as to Edward Cebrian's residence was made by the District Court, we find this allegation in Respondent's answer.

> "Defendant denies that she concealed, fraudulently or otherwise, the existence of the assets of the said Edward Cebrian, or that she has intermeddled, fraudulently or otherwise, with the jurisdiction of the Los Angeles Superior Court over said assets; defendant avers in this connection that she has inventoried and accounted for all of the assets of the Edward Cebrian estate in the probate proceeding pending in the San Francisco Superior Court and that the Los Angeles Superior Court never had or acquired, nor does it now

have, any jurisdiction over said assets. Defendant denies that the petition filed by defendant in San Francisco was a 'second' petition, but avers that it was the first petition signed and filed. *Defendant denies that her allegation in said San Francisco petition for letters of administration that Edward Cebrian was a resident of the City and County of San Francisco, State of California, at the time of his death was either false or fraudulent but avers that it was true and correct according to the best information and belief possessed by defendant then and now.* Defendant denies that she knew in February, 1945, or at any other time, that Edward Cebrian was a resident of the County of Los Angeles at the time of his death. Defendant avers that such alleged Los Angeles residence was not the fact. Denies that defendant made false or fraudulent allegations of fact to the San Francisco Superior Court in her petition for probate or by any other pleading or evidence; denies that said San Francisco Superior Court relied upon any alleged false or fraudulent representations; denies that said San Francisco Superior Court erred in appointing defendant as administratrix of the Estate of Edward Cebrian, deceased. Defendant denies that she ever wrongfully assumed possession or control of the property of Edward Cebrian".

(R. 15, Answer XI.)

The District Court found this allegation to be true. (Appendix 6, Finding 15 and Appendix 7, Finding 19.) Thus the Court of Appeals did not decide this factual issue de novo, as implied in the Petition (2, Questions Presented 1.)

Evidence as to Residence.

The Petition wholly ignores the evidence upon which the District Court and the Court of Appeals based their findings and conclusions as to Edward Cebrian's San Francisco residence at the time of his death. Instead it sets forth certain factors tending to show Los Angeles residence, with the bald but unfounded assertion that the evidence is uncontroverted. (Petition 5, 6 and 7.) The evidence to the contrary which abundantly supports the findings of the District Court is fairly summarized in the opinion of the Court of Appeals. (Opinion, Appendix 13 to 15.) Since there is no suggestion of any factual error in this summary of the evidence we feel it is unnecessary to repeat it. Suffice it to say that the deposition of Respondent and the testimony of Edwin A. Koch and Ralph J. Cebrian amply support the findings of the Court below on the residence issue.

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2. THE DISTRICT COURT DID NOT DECIDE AS A MATTER OF LAW THAT INTENT TO DEFRAUD IS AN INDISPENSABLE ELEMENT FOR EQUITABLE RELIEF, NOR DID IT PLACE ITS DECISION ON SUCH LACK OF INTENT.

It is true that the District Court found that none of the acts of Respondent in connection with the probate of the estate of Edward Cebrian was performed with any intent to deceive, delay, defraud or mislead creditors. (Appendix 7, Finding 20.) Such finding is supported by evidence and was fully documented in the trial Court. However, there is nothing in that finding, or elsewhere in the findings or conclusions,

which indicate that the general findings that Respondent was innocent of fraud were based solely or in any large measure upon such lack of fraudulent intent.

Lack of intent to mislead surely is an element in any case where fraudulent conduct is alleged. Therefore, when a Court examines a course of conduct and finds that it was not fraudulent, its decision on such a factual issue should not be open to challenge merely because it also finds there was no intent to deceive.

But even assuming an inference could be drawn that the District Court placed its decision solely on the lack of fraudulent intent, we find such a rule fully supported by the highest State Court of California. The case of *Bankers Trust Co. v. Patton* (1934) 1 Cal. (2d) 172 at 178 (33 P. (2d) 1019) involved a charge of fraud brought by a creditor against the administratrix of an estate. She was alleged to have concealed from the California Probate Court the fact that probate proceedings were also pending in Iowa. In holding that she was not guilty of fraud the California Supreme Court said:

> "The plaintiff contends that the defendant Patton must have intended to do what she actually did, viz., fail to divulge the facts to the court in California, and that this state of her mind was sufficient to constitute a wilful suppression under the cases relied upon. There was, however, no absolute duty on her part under the provisions of section 1040 of the Probate Code to present the facts involved unless the failure to do so amounted to active suppression in bad faith, or

> other circumstances were present which would constitute such act or omission a fraud upon the plaintiff. Bad faith, therefore, was a necessary additional element under the facts of the case which must be shown before the defendant may be found guilty of any fraudulent act or omission as to the plaintiff so as to charge her as a trustee. As stated, there is support in the evidence for the trial court's conclusion on this phase of the case."

The essential element in such a case is intent to induce the other party to act or fail to act to the latter's disadvantage. This is not the same as mere intent to deceive. Here the Respondent did not know of the note or its holders in 1945 and, of course, could have had no intent then to cause them to fail to file their claim or do anything else. This is the absence of intent which was and is an essential element of Respondent's defense.

Thus even if we were to conclude that the District Court placed its decision solely upon Respondent's lack of intent that Petitioner or her predecessors should act, or fail to act to their prejudice, such rule is in full accord with California law. (*Gagne v. Bertran* (1954) 43 Cal. (2d) 481, 275 Pac. (2d) 15.) There the Supreme Court of California said in a footnote on page 488 of 43 Cal. (2d):

> "Under this section of the Civil Code (1709) the intent required to prove a cause of action for deceit is an intent to induce action."

3. RESPONDENT'S AFFIRMATIVE DEFENSES WERE EXHAUSTIVELY BRIEFED AND PRESENTED TO THE COURT OF APPEALS.

Petitioner and Respondent each submitted many pages of written argument and briefs to the District Court on the subject of such affirmative defenses as the statutes of limitation of the states of California and Kentucky, the Petitioner's lack of title to the note in suit, the conflicts of law questions, and the interpretation of the language of the promissory note.

The District Court decided in favor of the Respondent on the main fraud issue and, therefore, expressly declined to make findings and conclusions on the affirmative defenses as unnecessary. (Appendix 9, Conclusion VI.)

Nevertheless, in her reply brief in the Court of Appeals, Respondent presented her argument and authorities to the reviewing Court with the following statement in the body of her brief:

> "While it is true these rather complex defenses, which involve interesting and intricate conflicts of law questions, were unnecessary to the decision of this case in view of the findings of fact against appellant's claim of fraud, nevertheless they are matters of law and if this Court were of the view no evidence supported the Trial Court's decision, we submit a decision on these special defenses should be made here, avoiding further delay and expense through remand. Therefore Appellee will present her argument upon such special defenses in an appendix to this brief so that this litigation may be termi-

nated without the necessity of further proceedings in the District Court and later appeal."

Such argument was separated from Respondent's argument on the fraud issue and was made an appendix to the argument on the main fraud issue.

Petitioner chose to file no reply to this portion of Respondent's reply brief at any time before, during or after oral argument in the Court of Appeals, although she did file a reply to the portion dealing with fraud.

Respondent's counsel, during oral argument, called the Court's attention to her special defenses and the portion of her brief in support thereof and argued briefly the salient features of these defenses.

The Petition in effect asks that a Writ of Certiorari issue because:

(i) The special defenses were not argued or briefed in the Court of Appeals; and

(ii) The Court of Appeals should not have devoted any time or attention to such special defenses, because:

(A) The Respondent's brief on these issues was separated from the rest of her brief by a blue page and the word "Appendix"; and

(B) A rule of the lower Court as to the length of briefs was violated. Had this latter objection been made below, which it was not, it cannot be doubted the alleged defect could have been cured.

The mere statement of these assertions indicates matters of form, rather than substance. A Writ of

Certiorari from the Supreme Court of the United States does not srike us as designed for the correction of such trivial matters of procedure.

We observe here also that any alleged defect in these respects could have been readily remedied by a Petition for Rehearing to the Court of Appeals. None was filed.

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4. THE QUESTION OF PLACE OF RESIDENCE WAS DETERMINED BY A FINAL JUDGMENT IN A STATE COURT AND THE DISTRICT COURT WAS PRECLUDED FROM DECIDING THAT ISSUE.

One of Petitioner's main arguments is that the District Court failed to decide the issue as to place of residence but that the Court of Appeals did decide this issue.

We have urged in our Point 1 above that the District Court did in fact make findings on that issue in favor of Respondent. However, if it can be asserted that such findings were not in proper form, there is a basic underlying reason why such a finding as to residence was not required.

The Superior Court of the State of California had made and entered a final judgment in 1945 in which it found as a fact that Edward Cebrian was a resident of the City and County of San Francisco at the time of his death. That finding was made after due legal notice had been given as provided by law and was binding on the whole world, since it was made in an in rem proceeding. (Appendix 4, Findings 11 and 12; Appendix 7, Conclusions II and III.)

Respondent has urged during the entire four years this case has been in litigation that the question of Edward Cebrian's residence is not open for decision as an issue in this case. At the same time, Petitioner has ever attempted by elaborate and resourceful moves to "prove" that Edward Cebrian was a resident of Los Angeles when he died.

A supplemental brief will be filed by Respondent, if permitted by this Court, setting forth the applicable California law on the binding effect of the state Court judgment in the probate proceeding. The leading California cases are:

Alden v. Superior Court (1921) 186 Cal. 309 at 312; 199 Pac. 29;

Holabird v. Superior Court (1929) 101 Cal. App. 49; 281 Pac. 108;

Estate of Relph (1921) 185 Cal. 605; 198 Pac. 639;

Estate of Dole (1905) 147 Cal. 188; 81 Pac. 534;

Estate of Latour (1903) 140 Cal. 414 at 425; 73 Pac. 1070, 74 Pac. 441;

Estate of Griffith (1890) 84 Cal. 107; 24 Pac. 381;

Estate of Spencer (1926) 198 Cal. 329; 245 Pac. 176;

Estate of Estrem (1940) 16 Cal. (2d) 563; 107 Pac. (2d) 36;

Estate of Robinson (1942) 19 Cal. (2d) 534; 121 Pac. (2d) 734;

Estate of Crisler (1948) 83 Cal. App. (2d) 431; 188 Pac. (2d) 772.

5. RESPONDENT COMMITTED NO FRAUD EXTRINSIC IN CHARACTER WITH RESPECT TO THE PROBATE PROCEEDINGS IN THE STATE COURT.

Even if we were to assume that the Probate Court should have found in 1945 that Edward Cebrian was a resident of Los Angeles when he died instead of San Francisco, it does not follow that the final judgment is not binding on Petitioner.

California law on this point is clear and the acts of Respondent do not constitute such extrinsic fraud as will entitle Petitioner to avoid the judgment.

A California probate case involving the finding of residence goes much further than the other cases cited and indeed much further than is necessary to blow away the Petitioner's "residence" issue. In *Estate of Crisler* (1948), 83 Cal. App. (2d) 431, 188 Pac. (2d) 772, a petition to probate the decedent's will was filed in Sacramento County alleging she died in Oregon but was a Sacramento resident. The petition was granted and letters testamentary issued. Later a beneficiary sought to revoke the probate on the ground that decedent was a resident of Oregon at the time of her death and that "there was fraud" when the executor alleged and testified that she was a resident of Sacramento County. Affidavits were filed by the beneficiary in support of this motion. The conflict between the executor's proof of residence as Sacramento County and that of the beneficiary was quite obviously not a showing of extrinsic fraud. The Court closes with the following statement at page 434:

> "Finally it may be stated that even though it could be said that Rodolph's testimony was per-

jured or that he misinformed the court, such acts or statements do not constitute extrinsic fraud but are intrinsic. Extrinsic fraud has been defined as that which has prevented a contestant from presenting his case to the court and does not apply to matter actually presented and considered. (*Zaremba v. Woods,* 17 C.A. 2d 309 (61 P. 2d 967); *O. A. Graybeal Co. v. Cook,* 16 Cal. App 2d 231 (60 P. 2d 525); *Hammell v. Britton,* 19 Cal. 2d 72 (119 P. 2d 333); *Estate of Robinson,* supra.) It must be admitted that the facts and circumstances of the present case do not come within such definition.

"The order appealed from is affirmed."

One interesting observation might be made at this point. Petitioner's predecessor herein appears to have arrived on the scene as owner of the assigned claim sued on here about May, 1950. He admittedly learned of both the San Francisco probate proceeding and the Los Angeles petition for letters at or about that time. Therefore, it is obvious that while she charges the direst forms of fraud and misconduct, it is obvious that such acts charged would not have the slightest effect upon her or her course of action or that of her predecessor's in interest, even if committed as she alleges.

We doubt if the question of where a wanderer resides and has his permanent domicile is ever so obvious *prior to a determination by a Court,* that it can be fraudulent for a relative to make an allegation as to such person's legal domicile in sincere accord with the

affiant's belief. And no one can read all of Respondent's deposition and doubt that in her mind, both in 1945 and now, Edward Cebrian's permanent home was in San Francisco all of his life.

Yet Petitioner contends that voting (which Respondent did not know about in 1945) and physical presence with some possessions is so *conclusive* as to Edward Cebrian's Los Angeles residence that it was active fraud for Repondent even to allege otherwise.

The final order made in San Francisco Superior Court on February 26, 1945, appointing Respondent administratrix was a conclusive determination of the jurisdiction of the Court, including the residence of Edward Cebrian in San Francisco.

Section 302, *Probate Code of California.*

The statute is prefaced by the clause "In the absence of fraud in its procurement". It has been settled in California that the "fraud" referred to in that section is "extrinsic", and not intrinsic fraud.

Estate of Robinson, 19 Cal. 2d 534 at 539; 121 P. 2d 734.

Except for being a much stronger case, we submit the facts of the *Crisler* case demonstrate that any action by Respondent could not possibly constitute "extrinsic" fraud. No act by her prevented Petitioner, or her predecessors, from appearing and filing their alleged claims within the time allowed by law. No such cause and effect relation between their failure and her acts has been shown.

In re Griffith (1890) 84 Cal. 107 at 112-113, 24 P. 381, was another probate matter in which one Gambetta was alleged to have sought letters of administration in San Joaquin County, knowing the decedent was a resident of Alameda County, and knowing also that his name appeared in the great register of Alameda County, all without disclosure to the Probate Court. The Court held this question of fraud alleged to have been committed was not extrinsic or collateral, but pertained to the precise matter before the Court: the residence of the deceased. The decision is based upon the United States Supreme Court case of *U. S. v. Throckmorton,* 98 U. S. 61, which it quotes as follows:

> " 'The acts for which a court of equity will, on account of fraud, set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, have relation to frauds extrinsic or collateral to the matter tried by the first court, and not to a fraud in a matter upon which the decree was rendered.' The principle laid down in this case is in accordance with the weight of authority, and is required by far-reaching considerations of public policy."

To the same effect is *Holabird v. Superior Court,* 101 Cal. App. 49 at 52-53, 281 Pac. 108, cited above.

(A) Extrinsic fraud.

One of the leading cases in California dealing with the distinction between extrinsic and intrinsic fraud is *Pico v. Cohn* (1891) 91 Cal. 129, 25 Pac. 970, 27 Pac. 537. There one Pico sought to set aside a former

judgment which Cohn had obtained against him. It was subsequently discovered that this judgment was obtained largely because Cohn had bribed one Johnson, an eye witness. The fraud of Cohn suborning perjury was held to be intrinsic and the judgment, having become final, the demurrer to the suit in equity to set it aside was sustained.

But from the Pico case and many subsequent cases we can, by example, determine what does constitute extrinsic fraud which entitled the party defrauded to be relieved from a decree so obtained.

(A) Keeping an unsuccessful party away from the Court by a false promise of compromise.

(B) Keeping a party in ignorance of a suit.

(C) Where an attorney fraudulently pretends to represent a party, but connives in his defeat.

Baker v. O'Riordon, 65 Cal. 368, 4 Pac. 232.

(D) Where an attorney fraudulently sells out his client's interests.

(E) Where false affidavits of service of summons or citation are made, no service being made.

Parsons v. Weis, 144 Cal. 410, 77 Pac. 1007.

(F) Where a person *knowingly* omits the names of heirs at law from a *petition for probate* of a will, so that they receive no notice, as required by law.

Zaremba v. Woods (1936) 17 Cal. App 2d 309, 61 Pac. 2d 976;

Probate Code of California, Sections 326, 328.

But see:

Mulcahey v. Dow (1900) 131 Cal. 73, 63 Pac. 158,

and

Lynch v. Rooney (1896) 112 Cal. 279, 44 Pac. 565,

where omitted heirs are held barred by the *decree of distribution.*

(G) Where the party guilty of fraud so misrepresented facts as to prevent the victim from discovering the earlier fraudulent acts which were the basis of the cause of action.

Caldwell v. Taylor (1933) 218 Cal. 471, 23 Pac. 2d 758, 88 A.L.R. 1194.

(H) Where a personal representative of a decedent wilfully suppresses material facts in bad faith for the purpose of preventing creditors from enforcing their rights.

Bankers Trust Co. v. Patton (1934) 1 Cal. 2d 172, 33 Pac. 2d 1019.

(I) Where a plaintiff had a defense and counterclaim but relied on the defendant's representation that if she did not defend he would hold the property in trust for her.

Flood v. Templeton, 152 Cal. 148, 92 Pac. 78.

The quotation of general language and even definitions on the question of whether an established fraud is extrinsic or intrinsic is of little help without a careful study of the facts of each case.

There are some factors which can be distilled from the cases which aid in the determination:

1. The party charged with the fraud must have performed some act or failed to perform some duty imposed upon him by law, which prevented some person affected by the judgment or order from having his or her day in court.

Bankers Trust Co. v. Patton (1934) 1 Cal 2d 172, 33 Pac. 2d 1019;

Caldwell v. Taylor (1933) 218 Cal. 471, 23 Pac. 2d 758.

Thus in *Sohler v. Sohler* (1902) 135 Cal. 323, 67 Pac. 282, and in *Campbell v. Campbell* (1907) 152 Cal. 201, 92 Pac. 184, we have two instances where the party charged with fraud was the mother and natural guardian of minor children who were victimized by her fraud. It was the duty of such mother and natural guardian to represent their interests in the probate proceedings involved, rather than to falsely and fraudulently deprive them of their inheritances at a time when they had no ability or opportunity to defend themselves.

2. The alleged fraud must, of course, *actually* have been effective to deprive Petitioner and her predecessors from having their day in Court.

Assuming that only in Los Angeles County could any valid probate of Edward Cebrian's estate occur, as Petitioner contends and we dispute: Petitioner must show as a minimum requirement to her prayer for equitable relief that solely by reason of the San

Francisco filing her predecessor was prevented or hindered from filing his claim in probate.

The absolute absence of evidence on this score is most eloquent. The evidence suggests the contrary conclusion. It appears that the holders of the note in suit were in a state of complete slumber so far as this asset was concerned from 1938 until Mr. Colville stirred them in 1950, or thereabouts.

Where then is any basis for relief if, conceding all else, Petitioner cannot show that the alleged fraudulent acts of Respondent did in fact prevent her predecessors from enforcing their rights?

Rather the Court is asked to speculate that *if* the probate proceeding had proceeded in Los Angeles the holder of the note would have been "presumed" to have learned of it in time to file his claim in time. The inference must be drawn that it would have made not the slightest difference to the holder of the note where in California Respondent sought administration.

Memory does not serve Respondent's counsel as to any creditor of Edward Cebrian who was in the Los Angeles area, either in 1934 or 1945.

(B) Intrinsic fraud.

Gale v. Witt, 31 Cal. 2d 362, 188 Pac. 2d 755. (Alleged false testimony as to witnessing of a will offered for probate.) Since it was one of the material issues decided in the petition for probate, such false allegation was held to constitute intrinsic, not extrinsic fraud, and to afford no relief in equity.

Lynch v. Rooney, 112 Cal. 279, 44 Pac. 565.

A finding in a decree of distribution as to who was the legal heir is binding and cannot be set aside in a separate suit in equity by other heirs wrongfully omitted. The fraud or mistake was intrinsic.

Mulcahey v. Dow, 131 Cal. 73, 63 Pac. 158.

Omitted heirs sought in vain to have a widow of their relative declared an involuntary trustee following a decree of distribution of the relative's estate. It will be noted the omitted heirs lived in other states and had only constructive notice of the proceeding.

In Colville v. Koch it will be remembered that notice of the filing of *both* petitions for probate was given by defendant to the whole world in the only manner recognized by law. She therefore had no duty or opportunity, even if she had known of the note in suit to give the holder any other notice.

3. The party seeking to be relieved from the effect of the judgment or order must demonstrate that his own negligence or laches did not contribute materially to the result.

Petitioner's proof reveals a complete absence of any activity on the part of her predecessors regarding the Cebrian note from 1938 until 1950. They apparently did not even bother to communicate with their California counsel during all this time.

Was it not this very failure to do anything whatever to keep in touch with their alleged debtor or inquire as to his assets or whereabouts that accounts for Petitioner's predecessors in interest failure to file a claim, not any activity Respondent is alleged to have

engaged in? We emphasize, it is whether the holders of this note were or were not misled or hindered by Respondent from filing their claim that is of import here. It matters not whether Cebrian's creditors generally might have known or would have "presumed" the Edward Cebrian's probate proceedings were in Los Angeles.

For all that appears here no holder of the Cebrian note in suit ever knew or heard that Edward Cebrian ever lived in Los Angeles until 1950 or later.

It does not appear that he ever owned real estate in Los Angeles, although the holders of the note knew that he owned land in Santa Barbara, San Luis Obispo and Yolo Counties. All this land was scheduled in his bankruptcy estate.

Respondent feels that the cases, *In re Griffith,* 84 Cal. 107, 24 Pac. 381; *Estate of Crisler,* 83 Cal App. 2d 431, 188 Pac. 2d 772; and *Estate of Robinson,* 19 Cal. 2d 534, 121 Pac. 2d 734, are so nearly parallel in point of fact as well as principle, that they are controlling here.

We submit:

(i) The alleged acts of Respondent, even if fraudulent, had no effect either to prevent Petitioner's perdecessors from appearing to contest the finding as to the residence or from filing a probate claim;

(ii) The Respondent did not act, and refrained from doing no act, which by law she was bound to do at the time she filed her petition for probate in San Francisco, which in any way hindered, misled, de-

ceived or prevented Petitioner's predecessors from appearing in the probate proceeding.

(iii) Petitioner has not sustained the burden of proof on the fraud issue, and that the contrary finding of the District Court is amply supported by the record.

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6. NO ISSUE IN THIS CASE WAS DECIDED IN A WAY IN CONFLICT WITH STATE LAW.

Where Edward Cebrian registered and voted is a factor to be considered in determining the residence of the voter. However, no California case is cited by Petitioner, nor can we find any to support Petitioner's extreme conclusion that voting is *conclusive* and outweighs all other evidence and declarations on the subject. Such is certainly not the law in California. In *Estate of Spencer* (1926) 198 Cal. 329, 245 Pac. 176, we have a collateral attack on an order establishing a decedent's residence. The evidence showed, as here, that the decedent had registered and voted in another county. The Court said:

> "It has been heretofore held by this Court that the mere fact that one is registered in a certain place and has voted therein is not conclusive evidence upon the question of his domicile. (*Bradley v. Davis,* 156 Cal. 267, 104 Pac. 302.)"

The petition sets forth certain factors indicating Los Angeles residence but ignores the great bulk of testimony and documentary evidence on which three different Courts have concluded Edward Cebrian never surrendered his San Francisco residence, despite long sojourns in other cities, states and countries.

With respect to the question of intent, when placed in its proper perspective as an intent to cause another to act or fail to act to the latter's disadvantage, we find the ruling of the District Court in strict conformity with California law. In all events, however, the decision is placed upon the ground (District Court) that Respondent "committed no fraud, extrinsic in character * * *" (Appendix 8, Finding 4) and "in our view (Court of Appeals) appellant (Petitioner) has entirely failed to prove that Isabelle C. Koch (Respondent) * * * was guilty of fraud of any kind or degree in the probate proceedings. * * *" (Appendix 16, Opinion.)

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7. **THE COURT OF APPEALS DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.**

The Court of Appeals *affirmed* the judgment of the District Court. As we have just shown, the Court of Appeals decided the same basic issue (presence or absence of fraud) on the same evidence and with the same conclusion as the District Court. No new evidence was introduced before the Court of Appeals. Furthermore, as we have shown, no new argument or authorities were presented to the Court of Appeals which had not been exhaustively argued and presented in written trial briefs to the District Court by both parties. This applies not only to the main fraud issue but also to the special affirmative defenses.

Petitioner was not taken by surprise in connection with these special defenses. She alone must accept the

results of the gamble she took of ignoring them on her appeal to the Court of Appeals.

Finally, we come to the argument that the Court of Appeals might have read and considered more than the maximum eighty (80) pages of Respondent's brief on appeal, notwithstanding a Rule of Court limiting such briefs to eighty (80) pages without leave of Court. We feel this is a matter the Court of Appeals would readily have remedied had Petitioner felt the defect in procedure substantial. Beyond this we can not seriously dignify this reason for a Writ by further discussion.

CONCLUSION.

The District Court made findings of fact and conclusions of law upon a considerable mass of oral and documentary evidence and after several general and specific briefs were requested and filed by each party. The Court of Appeals affirmed the judgment of the District Court in every respect. The decision is in accord with and based upon well established California precedents. No rule of procedure worthy of mention was violated.

Respondent respectfully prays that the Writ of Certiorari be denied.

Dated, San Francisco, California,
October 22, 1956.

Respectfully submitted,
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